In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1263

PUBLIC SERVICE COMPANY OF INDIANA, INC.,
PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unreported. The opinion of the Federal Power Commission (J.A. 471-509) is reported at 34 F.P.C. 1513, and its order denying rehearing (J.A. 525-526) at 35 F.P.C. 232.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1967 (Pet. App. 9a). The petition for a writ of certiorari was filed on April 12, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, as amended, 16 U.S.C. 825*l*(b).

QUESTION PRESENTED

Whether petitioner's sales of electric energy for resale are sales in interstate commerce and hence subject to the jurisdiction of the Federal Power Commission.

STATUTES INVOLVED

The statutes involved—Sections 201, 205, 206 and 313(b) of the Federal Power Act, 16 U.S.C. 824, 824d, 824e and 825*l*(b)—are printed in Appendix C to the petition for a writ of certiorari.

STATEMENT

Petitioner here seeks review of an order of the Federal Power Commission, upheld by the Court of Appeals for the Seventh Circuit, determining that the Commission has jurisdiction to regulate petitioner's wholesale sales of electric energy.

It is conceded that petitioner is a public utility within the meaning of Sections 201(b) and (e) of the Federal Power Act (Pet. App. 2a), since it owns or operates facilities for the transmission or sale at

wholesale of electric energy in interstate commerce (J.A. 165; Pet. 4). It is also conceded that its lines are interconnected with those of several companies which operate facilities in other States and from which petitioner purchases and receives out-of-State energy (J.A. 47, 110-111, 173-174; Pet. 4, 5; Pet. App. 2a, 5a). And it is part of an extensive interstate power network (J.A. 197-198, 452-453; Pet. App. 3a, 4a-5a). The only issue is whether its sales are in interstate commerce, a necessary predicate of Commission jurisdiction (see Section 201(b), 16 U.S.C. 824(b). On this the record shows that electric energy flows freely into, out of, and throughout the interconnected interstate network of which petitioner is a part (J.A. 92-94, 173-174). The amount of generation by each system is constantly changing (J.A. 105-108), for every increase in load (demand) in any system automatically results in an instantaneous inrush of energy from the other interconnected systems (J.A. 103-104). Thus, a load receiving energy from one source in the network at one moment may be receiving energy from another source the next moment (J.A. 109).[1] Beyond this, the record also establishes the actual commingling of out-of-State energy received by petitioner's system with other energy, both at the point of receipt and at certain buses (distribution points) from which

[1] For a somewhat fuller technical description, see p. 3, n. 3 of the Commission's Br. in Opp. in *Indiana & Michigan Elec. Co.* v. *Federal Power Commission*, No. 646, this Term, certiorari denied, 385 U.S. 972.

commingled energy flowed to *all* of petitioner's wholesale customers (J.A. 110-115, 123-124, 302-305).

The court of appeals held that proof of petitioner's participation in an interstate power network from which it received substantial amounts of out-of-State energy was, as the Commission had held, "sufficient to support an inference, to a reasonable scientific certainty, that interstate energy entered all of the sales in question and commingled with PSCI-generated energy" (Pet. App. 5a). It also sustained the Commission's finding that its jurisdictional conclusion based on the nature of the network's operations was corroborated by actual staff studies of the flow of out-of-State energy throughout petitioner's system (Pet. App. 6a; J.A. 472-474, 526).

ARGUMENT

1. Petitioner argues that its sales at wholesale are not in interstate commerce. The identical contention was rejected by the same court of appeals in *Indiana & Michigan Electric Co.* v. *Federal Power Commission*, 365 F. 2d 180, and certiorari was recently denied, 385 U.S. 972. The other circuits that have passed on the question are in accord with the Seventh Circuit. *Arkansas Power & Light Co.* v. *Federal Power Commission*, 368 F. 2d 376 (C.A. 8); *Cincinnati Gas & Electric Co.* v. *Federal Power Commission*, C.A. 6, No. 17228, decided April 28, 1967; App., *infra*, pp. 7-11. That all wholesales of electric energy by a member of an interstate power pool are subject to the Commission's jurisdiction is also the

teaching of *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U.S. 414, which held that, where a pool of energy generated in several States supplies the entire system load, "the operations of the unified system enterprise are completely interstate in character, notwithstanding the fact that system energy transactions at some particular times may involve energy never crossing the State boundary." 343 U.S. at 420; see, also, *Wisconsin-Michigan Power Co.* v. *Federal Power Commission*, 197 F. 2d 472 (C.A. 7), certiorari denied, 345 U.S. 934; *Wisconsin* v. *Federal Power Commission*, 201 F. 2d 183 (C.A.D.C.), certiorari denied, 345 U.S. 934.[2] Although no more is required, the Commission's jurisdictional finding is independently supported by the flow studies, introduced in evidence, which showed that out-of-State energy was in fact received by all of petitioner's wholesale customers.

2. Petitioner contends that federal regulation of its wholesale sales is unnecessary and therefore improper because all sales of out-of-State energy to it are regulated by the Federal Power Commission and

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[2] It makes no difference that the pool of which petitioner is a member was not under common ownership; that was also the case in the *Pennsylvania Water & Power* case (see 343 U.S. at 419-420). Petitioner admits that it "does effect operating economies through purchase and sales transactions over its interconnections with neighboring utilities" (Pet. 5), and, as the court below found, petitioner's "participation in this pool by virtue of its interconnections, even though only for economy and emergency purposes, results in the introduction of a substantial amount of out-of-state energy into PSCI's system." Pet. App. 5a.

all of its own sales (being to Indiana customers) are subject to regulation by the Indiana Public Service Commission. This Court recently rejected the identical argument. *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, holds that the Commission's jurisdiction under the Federal Power Act extends "to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States" (376 U.S. at 216) and that the Act contains no exemption for out-of-State energy sold for consumption within the receiving State (*id.*, n. 9).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1967.

APPENDIX

No. 17228

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE CINCINNATI GAS & ELECTRIC COMPANY AND THE UNION LIGHT, HEAT AND POWER COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

On Petition for Review of an Order of the Federal Power Commission

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Decided April 28, 1967.

Before WEICK, Chief Judge, PECK, Circuit Judge, and CECIL, Senior Circuit Judge.

WEICK, Chief Judge. This proceeding is to review an order of Federal Power Commission, made under the authority of Section 201 of the Federal Power Act[1] requiring the petitioners, The Cincinnati Gas & Electric Company (CG&E) and its affiliate, The Union Light, Heat and Power Company, to file and

[1] 16 U.S.C. § 824.

maintain on file with the Commission rate schedules covering their wholesale sales.[2]

The petitioners resisted jurisdiction of the Commission to make the order, claiming that, within the meaning of the Act, their wholesale sales did not involve the delivery to their customers of electrical energy generated out of the state, and in any event the sales were made from local distribution facilities and were therefore exempt under Section 201(b) of the Act.

A hearing was held before the Presiding Examiner of the Commission and evidence, including expert testimony, was offered by both the Commission and the petitioners.

The hearing consumed about fifteen days and the case was submitted to the Presiding Examiner on the evidence, oral arguments and briefs. The Presiding Examiner gave careful consideration to the case and handed down his Initial Decision, in which he adopted findings of fact and conclusions of law. His decision appears in twenty-nine pages of the record.

The Presiding Examiner found as a fact:

> "(10) At times each of the wholesale customers named above in (4) and (5) receives out-of-state electric energy from the multi-state power network of which the Cincinnati system is a part, such energy having been commingled with the Cincinnati system energy.
>
> "(11) The integrated and coordinated Cincinnati interstate electric system and the

[2] Petitioners admitted that three of CG&E's wholesale customers received out of state energy, but contended that evidence does not support the holding that eight others received such energy.

> systems with which it is interconnected and operating in synchronism form an integrated and operating power pool, and the sales of electric energy by the Cincinnati system to its wholesale customers named above in (4) and (5) are pool sales and by reason of the interstate nature of the pool are sales in interstate commerce."

He also found that the facilities from which the energy is delivered to CG&E's wholesale customers, were at least in part constructed and used to sell and interchange energy with other companies and are not used solely in local distribution. He further held that interstate wholesale sales are not exempt from jurisdiction of the Commission.

The Commission adopted the Presiding Examiner's Initial Decision in all material respects and ordered the filing of the rates.

It was conceded by petitioners that they are public utilities within the meaning of the Act.

CG&E and its wholly owned subsidiaries are a part of a coordinated and interconnected electric system serving a highly industrialized area of 2600 square miles in nine counties in southwestern Ohio, five counties in northern Kentucky, and one county in eastern Indiana. CG&E owns and operates three electric generating stations which are interconnected by transmission lines through Ohio and Kentucky. The system is connected with eight other utility companies in Ohio, Indiana and Kentucky. These other companies in turn are connected with other utilities which constitute the American Electric Power System.

All of these companies are part of the Interconnected Systems Group consisting of one hundred forty utility systems, in thirty-two states. The System forms a pool of multi-state energy which supplies the load of CG&E in synchronism with the other connected utilities. CG&E thus utilizes out of state energy as well as energy generated by it, to fulfill its requirements. In turn, energy generated by CG&E flows through the system, out of the state, and is used by other utilities.[3]

Staff witness Miller testified that each of the wholesale customers in question received out of state energy commingled with Ohio energy. Staff witness Dr. Jessel testified that in an interconnected pool operation, interstate energy was delivered to each of CG&E's wholesale customers.

Petitioners' claim was that the evidence was not sufficient to identify out of state energy as being delivered to the wholesale customers; that all units of electricity are identical and it is impossible to identify one unit from another; that the burden was upon the Commission to show the actual source of the specific units delivered to the wholesale customers, and it was scientifically impossible to do so.

There can be no question but that interstate as well as intrastate generated electricity was commingled and was flowing through the CG&E system. This is enough to sustain the Commission's jurisdiction.

It would indeed be impossible to prove the source of electrical current supplied from a pool. It was not necessary for the Commission to do so.

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[3] In 1963 CG&E system received 11% of its total net generation from out of state, of which 9% was from Indiana sources.

As well stated by the Court in *Pennsylvania Water & Power Co.* v. *F.P.C.*, 193 F.2d 230, at 241 (D.C. Cir. 1951) *aff'd* 343 U.S. 414 (1952):

> "Each sale is in effect a pool sale drawn from the integrated system and hence interstate in nature."

See also *United States* v. *Public Util. Comm'n of Cal.*, 345 U.S. 295 (1953).

Other Appellate Courts have rejected similar contentions. *Indiana & Mich. Elec. Co.* v. *F.P.C.*, 365 F.2d 180 (7th Cir. 1966), *cert. denied* 385 U.S. 972 (1966); *Public Service Co. of Ind., Inc.* v. *F.P.C.*, — — F.2d —— (7th Cir. 1967); *Arkansas Power & Light Co.* v. *F.P.C.*, 368 F.2d 376 (8th Cir. 1966).

We are satisfied that the distribution facilities of CG&E were not used solely in intrastate distribution and that the exemption was not available to it with respect to its wholesale sales. *Indiana & Mich. Elec. Co.* v. *F.P.C.*, *supra; Wisconsin & Mich. Power Co.* v. *F.P.C.*, 197 F.2d 472 (7th Cir. 1952) *cert. denied* 345 U.S. 934 (1953).

In our opinion, the findings of fact of the Commission are supported by substantial evidence and are binding on us.

Affirmed.

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